No. 90-5319

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Paul McNeil,
Petitioner,

v.

Wisconsin,
Respondent.

On Writ of Certiorari to the
Supreme Court of Wisconsin

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

SUPPLEMENTARY STATEMENT OF THE CASE

The statement of the case provided by the petitioner (hereinafter "the defendant") is generally accurate and complete. The respondent (hereinafter "the state") has only two modest additions to it, relating to the circumstances surrounding Milwaukee County Detective Butts' initiation of discussion

with the defendant about the Racine County offenses at issue in this case after the defendant had appeared with counsel at his initial hearing on Milwaukee County charges.

First, Detective Butts initiated that discussion, at least in part, because the defendant had indicated, prior to his court appearance on the Milwaukee County charges, that he wanted to talk to him. Prior to the defendant's return from Omaha, Nebraska, Butts had had a conversation with the defendant's girlfriend (R. 43:8). The defendant's girlfriend had informed him that the defendant would not be fighting extradition, and that "he wanted to talk to [Butts] when he got back to Milwaukee" (R. 43:9).

Second, when he approached the defendant on the evening of May 22, 1987, after the defendant's appearance with counsel earlier that day at the initial hearing on the Milwaukee County charges, Detective Butts intended "to talk to him about the armed robbery in Milwaukee County" and "possibly the Caledonia [Racine County] homicide also" (R. 40:14). But he "never got a chance to get into the [Milwaukee County] robbery" (*id.*). After he read the defendant his *Miranda* rights and the defendant signed the waiver of them, the defendant "said I guess you want to talk to me about this thing in [Racine County]" (*id.*). Butts replied that he did and "at that point [the defendant] started telling [Butts] exactly what transpired at that particular time" (*id.*).

SUMMARY OF ARGUMENT

At issue here is the admissibility of the defendant's statements about his participation in the crimes charged in this Racine County prosecution, which were made during police-initiated interrogation after his appearance with counsel at an initial hearing on unrelated charges in Milwaukee County. The defendant contends those admissions were

obtained in violation of the rule this Court created in *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), hereinafter "the *Edwards* rule," which bars police-initiated interrogation after a defendant invokes his right to counsel during custodial interrogation.

In considering the defendant's contention, it is necessary to recognize that two distinct rights to counsel potentially come into play when a defendant is interrogated by the police: the **Fifth Amendment** right recognized in *Miranda v. Arizona*, 384 U.S. 436, 470-71 (1966), which applies whenever a criminal suspect is subjected to custodial interrogation; and the **Sixth Amendment** right directly conferred by the Constitution, which precludes the police from deliberately eliciting statements from the defendant in counsel's absence after the formal initiation of a criminal prosecution.

Although the *Edwards* rule applies in both the Fifth Amendment and Sixth Amendment con-

texts, *see Michigan v. Jackson*, 475 U.S. 625 (1986), the defendant's invocation of his Sixth Amendment right to counsel by appearing with an attorney on the Milwaukee County charges could not possibly be deemed to have barred police-initiated interrogation on the Racine County offenses since, with respect to them, the Sixth Amendment right to counsel had not attached. To trigger the *Edwards* rule in this case, that appearance with an attorney would have to be regarded as an invocation of the Fifth Amendment right to counsel.

The critical issue in this case, then, is whether a defendant who appears with counsel[1] at a court hearing on a criminal charge

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[1]The "question presented" in this case refers to both the defendant's "appearance with counsel" and his "acceptance of assistance of counsel" (defendant's brief at i). Throughout this brief, the state, in the interest of brevity, refers only to the appearance with counsel, but it intends thereby to subsume the acceptance of assistance of counsel as well, and the arguments it makes are intended to cover both situations.

thereby invokes his Fifth Amendment right to counsel. That issue can be approached from five perspectives, all of which lead to the conclusion that a defendant who appears with counsel at a court hearing on a criminal charge does not thereby invoke his Fifth Amendment right to counsel:

1. Principle. To resolve the issue presented, it is necessary to establish some principled basis by which to judge whether a particular invocation of the right to counsel is an invocation of the Fifth Amendment right to counsel. The Fifth Amendment right to counsel is part of the scheme this Court created in *Miranda* to protect the privilege against self-incrimination in the context of custodial interrogation. That scheme includes the giving of the now-familiar warnings about the defendant's rights during custodial interrogation, the securing of a valid waiver of those rights, and the restraints on the conducting of custodial

interrogation if those rights are invoked. Thus, a principled approach to the question whether the Fifth Amendment right to counsel has been invoked would ask whether the request for counsel was made by an in-custody suspect in response to *Miranda* warnings, or in direct anticipation of, or during, interrogation. That does not describe the request for counsel implicit in a defendant's appearance with counsel at a court hearing.

2. Perception. In *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987), this Court, in determining whether the *Edwards* rule was triggered by the particular reference to counsel made by the defendant in that case, looked to how "ordinary people" would understand the defendant's words. A similar approach is appropriate here. An "ordinary person" would perceive a defendant's appearance with counsel at a court hearing on a particular charge as an invocation of the

Sixth Amendment right to counsel and not of the Fifth Amendment right to counsel.

3. Policy. In determining the scope of the prophylactic rules that *Miranda* and its progeny have established, this Court must consider "two competing concerns": first, the need for police questioning as a tool for effective enforcement of criminal laws; second, the need to protect against compelled self-incrimination. *Moran v. Burbine*, 475 U.S. 412, 426 (1986). Here, society's "legitimate and substantial interest in securing admissions of guilt" from wrongdoers, *id.* at 427, would be significantly impeded by a rule precluding police-initiated interrogation about an uncharged offense after the defendant has appeared with counsel at a court hearing on an unrelated, charged offense. And the competing concern about compelled self-incrimination does not have sufficient substance to warrant adoption of such a rule, for the pros-

pect of police "badgering" against which such rule would protect is all but nonexistent in the present context.

4. Perspicuity. This Court has "repeatedly emphasized the virtues of a *bright-line rule* in cases following *Edwards* as well as *Miranda*." *Arizona v. Roberson*, 486 U.S. 675, 681 (1988) (emphasis supplied). Neither of the two opposing rules sought by the parties here has a greater claim to providing "bright-line" guidance in the specific situation to which the rules are addressed. But, once one considers their impact in situations to which they might not directly apply, but in which they might be examined for guidance, the state's rule, based as it is on a principled analysis of the issue, would promote clarity in application of the *Edwards* rule, while the defendant's would not.

5. Precedent. The majority of state courts confronting the issue presented in

this case conclude that an appearance with counsel at a court hearing on a charged offense is not an invocation of the Fifth Amendment right to counsel. The federal circuit court of appeals' decisions are more evenly split on the issue, but those supporting the defendant's position provide cause for questioning the desirability of adopting that position.

Contrary to the defendant's contention, precedent from this Court has not resolved the issue. It must be resolved by examining the five factors the state has surveyed above--principle, perception, policy, perspicuity, and the precedent from other jurisdictions that has directly decided the issue--all of which lead to one conclusion: a defendant who appears with counsel at a court hearing in a criminal prosecution does not thereby invoke his Fifth Amendment right to counsel.

ARGUMENT

THE DEFENDANT'S APPEARANCE WITH COUNSEL AT AN INITIAL HEARING ON AN ARMED ROBBERY CHARGE WAS NOT AN INVOCATION OF HIS FIFTH AMENDMENT RIGHT TO COUNSEL THAT BARRED POLICE-INITIATED INTERROGATION ABOUT UNRELATED, UNCHARGED OFFENSES.

A. The issue presented in this case is whether a defendant who appears with counsel at a court hearing on a criminal charge thereby invokes his Fifth Amendment right to counsel.

At issue in this case is the admissibility of statements the defendant made to the police about his participation in crimes that occurred in Racine County, Wisconsin, including murder, attempted murder, burglary, and armed robbery. Before making those statements, the defendant had been brought before a judicial court commissioner for an initial appearance on unrelated charges in Milwaukee County (i.e., three counts of armed and masked robbery) (R. 31:2; J.A.

8).[2] At that initial appearance, the defendant appeared with an attorney from the public defender's office (R. 32:2; J.A. 7).[3] The defendant's statements about the Racine County crimes were the product of police-initiated interrogation that occurred after the court appearance on the Milwaukee County charges, but before formal criminal charges were filed on the Racine County offenses.

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[2]Under Wisconsin law, "[a]ny person who is arrested shall be taken within a reasonable time before a judge in the county in which the offense was alleged to have been committed." Sec. 970.01(1), Wis. Stats. At that initial appearance, the judge is to inform the defendant of the charge against him, of his right to counsel, and of his right to a preliminary examination. Sec. 970.02(1), Wis. Stats. The judge also is required to "admit the defendant to bail." Sec. 970.02(2), Wis. Stats.

[3]Under the administrative rules governing the Wisconsin State Public Defender, the public defender or his designee "shall advise all persons charged with a crime, . . . *prior to their initial court appearance*, that they have a right to be represented by an attorney in the proceeding without charge if found indigent." Wis. Admin. Code § SPD 2.03(5) (1990) (emphasis supplied).

The defendant contends that the statements he made about the Racine County crimes were obtained in violation of the rule this Court created in *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), hereinafter "the *Edwards* rule":

> [A]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

In considering the defendant's contention, it is necessary to recognize that there are two distinct rights to counsel that potentially come into play when a defendant is interrogated by the police. *See Michigan v. Jackson*, 475 U.S. 625, 629 (1986). The first is the **Fifth Amendment** right to counsel recognized in *Miranda v. Arizona*, 384 U.S. 436, 470-71 (1966), which this Court created to protect the privilege against self-incrimination and which applies

whenever a criminal suspect is subjected to custodial interrogation. The other is the **Sixth Amendment** right to counsel directly conferred by the Constitution, which attaches after the formal initiation of a criminal prosecution and which precludes the police from deliberately eliciting statements from the defendant in counsel's absence from that point on. *Maine v. Moulton*, 474 U.S. 159, 170-74 (1985).

In arguing that the *Edwards* rule barred police-initiated interrogation regarding the Racine County offenses after his appearance with counsel at his initial hearing on the Milwaukee County charges, the defendant relies primarily on two post-*Edwards* decisions of this Court:

- **Michigan v. Jackson**, 475 U.S. 625 (1986), in which this Court extended the *Edwards* rule, which was initially recognized "as a corollary" to the Fifth Amendment right to counsel, *see Arizona v. Roberson*, 486 U.S. at 680, to the Sixth Amendment right to counsel. Under *Jackson*, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar

proceeding, of his [Sixth Amendment] right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 475 U.S. at 636.

- **Arizona v. Roberson**, 486 U.S. 675 (1988), in which this Court made it clear that *Edwards* is not in any way "investigation-specific." 486 U.S. at 684. If a defendant invokes his right to counsel during custodial interrogation, i.e., his Fifth Amendment right to counsel, the *Edwards* rule bars police-initiated interrogation, even though that request for counsel occurred in the context of a separate investigation. 486 U.S. at 682.

Though he relies on passages from *Michigan v. Jackson* to support his position, the defendant does not suggest that it is controlling here. The reason for that is obvious: the Sixth Amendment right to counsel whose invocation triggers the *Edwards* rule under *Jackson* does not attach to interrogation about uncharged offenses. *See Arizona v. Roberson*, 486 U.S. at 685; *Maine v. Moulton*, 474 U.S. at 180 n.16. Thus, the defendant's invocation of his Sixth Amendment right to counsel at the initial appearance on the Milwaukee County charges could

not possibly have rendered improper the police-initiated interrogation about the Racine County offenses. That interrogation occurred before the defendant was formally charged with those offenses, so he had no Sixth Amendment right to counsel with respect to them.

The defendant makes no contention to the contrary. He does not argue that his invocation of his Sixth Amendment right to counsel barred further police-initiated interrogation about the Racine County crimes, with respect to which that right had not attached. And, so far as the state is aware, no authority exists that would support such a contention. All the decisions that support the defendant's position that the *Edwards* rule applies in the present context do so only after first finding that a defendant's invocation of his right to counsel at a court appearance constitutes an invocation not only of his Sixth Amendment right to

counsel, but of his Fifth Amendment right as well. *See, e.g., United States v. Wolf*, 879 F.2d 1320, 1322-23 (6th Cir. 1989), and *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 120-21 (7th Cir.), *cert. denied*, 483 U.S. 1010 (1987).

Rather than arguing that *Jackson* is controlling here, the defendant relies on *Arizona v. Roberson* as the critical case supporting his position. As already indicated, *Roberson* holds that an invocation of the Fifth Amendment right to counsel triggers *Edwards* and bars police-initiated interrogation not just about the offense with respect to which that right to counsel has been invoked, but about any offense. The defendant argues that his appearance with counsel on the Milwaukee County charges invoked not only his Sixth Amendment right to counsel on those charges, but his Fifth Amendment right to counsel on them as well. Thus, under *Roberson*, police-initiated interrogation

about any offenses, including the Racine County crimes, was barred by the *Edwards* rule.

The critical issue facing this Court, then, is whether a defendant who appears with counsel at a court hearing on a criminal charge thereby invokes his Fifth Amendment right to counsel.[4] This Court left that issue unresolved in *Michigan v. Jackson*, 475 U.S. at 630 n.4, and has not

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[4]By labeling the issue presented as "critical," the state is saying only that it is critical to the defendant's success in this case, not that it is necessarily critical to the state's success here. Even if the defendant were to convince this Court that an accused appearing with counsel at a court hearing thereby invokes his Fifth Amendment right to counsel, there would still remain the question whether an invocation of the Fifth Amendment right to counsel at a court hearing on a charged offense, rather than at interrogation as was the case in *Roberson*, should, under *Roberson*, trigger the *Edwards* rule and bar police-initiated interrogation about other unrelated, uncharged offenses. But, because it does not believe this Court will find an invocation of the Fifth Amendment right to counsel under circumstances such as those presented here, the state sees no need to address that question.

resolved it since (see discussion at pages 62-65 of this brief regarding decisions and orders of this Court that the defendant asserts have "implicitly" resolved the issue presented, but which in fact have not).

The issue presented can be approached from five perspectives, all of which lead to the conclusion that a defendant who appears with counsel at a court hearing on a criminal charge does *not* thereby invoke his Fifth Amendment right to counsel:

- **Principle:** Considering the context in which the Fifth Amendment right to counsel operates, the only principled way to decide whether that right has been invoked is to ask whether the request for counsel was made by an in-custody suspect in response to *Miranda* warnings, or in direct anticipation of, or during, interrogation, which does not describe a defendant's appearance with counsel at a court hearing.

- **Perception:** An "ordinary person" would perceive a defendant's appearance with counsel at a court hearing on a particular charge as an invocation of the right to counsel conferred by the Sixth Amendment and not of the right to counsel created to protect the Fifth Amendment privilege against self-incrimination.

- **Policy:** A balancing of society's "legitimate and substantial interest in securing admissions of guilt" from wrongdoers against the minimal increase in protection against compelled self-incrimination that adoption of the defendant's position would afford results in the conclusion that an appearance with counsel at a court hearing on a charged offense should not be deemed an invocation of the Fifth Amendment right to counsel that would bar police-initiated interrogation about unrelated offenses.

- **Perspicuity:** A holding that the Fifth Amendment right to counsel is not invoked by appearance with counsel at a court hearing on a charged offense would provide a "bright-line" rule that would most closely accord with reality and that would afford the clearest guidance to those involved in the administration of the criminal justice system.

- **Precedent:** The majority of state courts confronting the issue presented in this case conclude that an appearance with counsel at a court hearing on a charged offense is not an invocation of the Fifth Amendment right to counsel; the federal circuit court of appeals' decisions are more evenly split on the issue, but those supporting the defendant's position provide cause for questioning the desirability of adopting that position; and, contrary to the defendant's contention, precedent from this Court has not resolved the issue.

Each of these perspectives on the issue presented is individually explored in the following sections of this brief.

B. Examining the issue presented from the perspective of principle: Considering the context in which the Fifth Amendment right to counsel operates, the only principled way to decide whether that right has been invoked is to ask whether the request for counsel was made by an in-custody suspect in response to Miranda warnings, or in direct anticipation of, or during, interrogation, which does not describe a defendant's appearance with counsel at a court hearing.

To resolve the issue presented, it is necessary to establish some principled basis by which to judge whether a particular invocation of the right to counsel is an invocation of the Fifth Amendment right to counsel recognized in *Miranda*. That principled basis is found in the *Miranda* decision itself.

In *Miranda*, this Court set up procedures designed to protect the Fifth Amendment privilege against self-incrimination in the context of "custodial interrogation." 384 U.S. at 444. Among them was the requirement that interrogation cease upon a request for counsel. In the brief description of those

procedures set forth at the outset of the *Miranda* decision, this Court described the request for counsel that would require a cessation of questioning:

> If, however, [the defendant] indicates in any manner and *at any stage of the process* that he wishes to consult with an attorney before speaking there can be no questioning.

Miranda v. Arizona, 384 U.S. at 444-45 (emphasis supplied).

In the context of the *Miranda* decision, which was addressing police interrogation outside the setting of formally initiated criminal proceedings, the "process" to which the decision refers is obviously the process of custodial interrogation and the procedures this Court created to govern it. Those procedures consist of the giving of the now-familiar warnings about the defendant's rights during custodial interrogation, the securing of a valid waiver of those rights, and the restraints on the conducting of custodial interrogation if those

rights are invoked. Thus, to be invoked "at any stage of the process," the request for counsel would have to be made by an in-custody suspect in response to the administration of the warnings prescribed in *Miranda*, or in direct anticipation of, or during, interrogation.

That, of course, does not describe the situation here. The invocation of the right to counsel implicit in the defendant's appearance with counsel at the initial hearing had nothing to do with the administration of *Miranda* warnings. Nor was it made during, or in direct anticipation of, custodial interrogation. No such interrogation was occurring, and none was being anticipated at the time.

To support his contention that his appearance with counsel was an invocation of his Fifth Amendment right to counsel, the defendant invokes this Court's observation in *Michigan v. Jackson*, 475 U.S. at 633,

regarding the need "to give a broad, rather than a narrow interpretation to a defendant's request for counsel" (defendant's brief at 9-10, 15). Whether that observation has any application here is questionable, and it certainly provides no principled basis for deciding whether the Fifth Amendment right to counsel has been invoked.

The *Jackson* admonition that a request for counsel should be given a "broad" interpretation was made in the context of determining how broad an interpretation should be given to the defendant's invocation of a specific right to counsel: his Sixth Amendment right to counsel. Was the invocation of the Sixth Amendment right to counsel simply a request for counsel's representation at formal legal proceedings, or did it extend as well to other critical stages of the prosecution, including interrogation?

The question here is not how broadly an invocation of a particular right to counsel

should reach insofar as the stages of the prosecution are concerned. Rather, it is whether the right was invoked at all. It is one thing to give a broad interpretation to an invocation of the Sixth Amendment right to counsel to find that it reaches all critical stages of the prosecution; quite another to give it a broad interpretation that transmutes it into an invocation of the Fifth Amendment right to counsel.

In any case, the "broad interpretation" language of *Jackson* fails to provide a principled basis upon which to decide whether a defendant has invoked his Fifth Amendment right to counsel. Under it, all invocations of the Sixth Amendment right to counsel would perforce become invocations of the Fifth Amendment right to counsel.

Such an approach would ignore the very real differences between the Sixth Amendment right to counsel and the Fifth Amendment right to counsel. *See Arizona v. Roberson*,

486 U.S. at 685. The Sixth Amendment right to counsel "arises from the fact that the suspect has been formally charged with a particular crime." *Id.* It applies to every "critical stage" of a criminal prosecution. *Maine v. Moulton*, 474 U.S. at 170. And it does not depend on a defendant's being in custody. *United States v. Henry*, 447 U.S. 264, 273 n.11 (1980); *Rhode Island v. Innis*, 446 U.S. 291, 300 n.4 (1980).

The Fifth Amendment right to counsel, on the other hand, is not dependent on the initiation of formal criminal proceedings. *Arizona v. Roberson*, 486 U.S. at 685. It applies only to interrogation. *Rhode Island v. Innis*, 446 U.S. at 298. And it requires custody. *United States v. Henry*, 447 U.S. at 273 n.11.

Those significant differences in the two rights' applicability should, as a matter of principle, produce differences in the circumstances under which they will be deemed

invoked. The "broad interpretation" approach, under which an invocation of the Fifth Amendment right to counsel would be found whenever there has been an invocation of the Sixth Amendment right to counsel, ignores those differences and thus produces an unprincipled approach to the problem.

Moreover, the "broad interpretation" approach would divorce the invocation of the Fifth Amendment right to counsel from *Miranda* warnings and custodial interrogation. It would thus completely cut that right loose from the *Miranda* decision and the procedures it established to protect the Fifth Amendment privilege against self-incrimination in the context of custodial interrogation. For that reason, it should be rejected. *Cf. Beckwith v. United States*, 425 U.S. 341, 345 (1976) (rejecting a particular application of *Miranda* because it would "cut this Court's holding in [*Miranda*] completely loose from its own explicitly

stated rationale"); *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) (same).

This Court should adopt the principled approach suggested by the state. An invocation of the Fifth Amendment right to counsel should be found only when a request for counsel is made by an in-custody suspect in response to *Miranda* warnings, or in direct anticipation of, or during, interrogation. That does not describe the request for counsel implicit in a defendant's appearance with counsel at a court hearing.

C. Examining the issue presented from the perspective of perception: An "ordinary person" would perceive a defendant's appearance with counsel at a court hearing on a particular charge as an invocation of the right to counsel conferred by the Sixth Amendment and not of the right to counsel created to protect the Fifth Amendment privilege against self-incrimination.

In *Connecticut v. Barrett*, 479 U.S. 523 (1987), this Court was called upon to decide whether the *Edwards* prohibition on further

police-initiated interrogation once an accused has invoked his right to counsel should have barred further police interrogation of a suspect who, "though stating his willingness to speak to police, had indicated that he would not make a written statement outside the presence of counsel." 479 U.S. at 525. The defendant invoked the broad-interpretation-of-requests-for-counsel approach referred to in the preceding section of this brief, contending it supported his position. This Court disagreed:

> [W]e observe that this approach does little to aid respondent's cause. Interpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous. . . . To conclude that respondent invoked his right to counsel for all purposes requires not a broad interpretation of an ambiguous statement, but a disregard of the ordinary meaning of respondent's statement.

479 U.S. at 529-30.

Although *Barrett* dealt with the interpretation of an invocation of the Fifth Amend-

ment right to counsel, its approach also provides an appropriate benchmark for judging whether a defendant has invoked that right at all. In making that judgment, this Court should ask how an "ordinary person" would perceive the defendant's action.

Applying that test here, there is no basis for finding that a defendant invokes his Fifth Amendment right to counsel when he appears with counsel at a court hearing on a charged offense. The perception of the "ordinary person" would be that, by such action, the defendant was seeking the assistance of counsel in facing the particular charge being prosecuted--the assistance that the Sixth Amendment guarantees. Concededly, the "ordinary person" might view the invocation of the right to counsel implicit in the appearance with counsel as extending beyond the court proceedings regarding the charged offense to police interrogation about it. But, in so doing, the "ordinary person"

would view the assistance of counsel at such interrogation as being tied to and growing out of the particular offense charged--still the assistance that the Sixth Amendment guarantees. *See Arizona v. Roberson*, 486 U.S. at 685. An "ordinary person" would not view a defendant's appearance with counsel at a court hearing as evincing a general desire for counsel's assistance in dealing with any police questioning to which he might be subjected, including that about other uncharged offenses--the assistance that *Miranda* guarantees to protect the Fifth Amendment privilege against self-incrimination.

The defendant would no doubt respond to the foregoing with the quotation from *Michigan v. Jackson*, 475 U.S. at 633-34 n.7, that he sets out at pages 15-16 of his brief:

> "Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an ac-

> cused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. . . ."

That quotation does not undercut the state's argument for two reasons. First, the words in that quotation are not those of this Court, but of the Michigan Supreme Court in the decision being reviewed in *Michigan v. Jackson*. Concededly, the words were quoted with this Court's express approval, but it is unlikely that this Court meant them to have any meaning other than that intended by their author. As this Court expressly recognized in *Jackson*, the Michigan Supreme Court, in its decision, concluded that a defendant requesting counsel at an arraignment does not thereby invoke his Fifth Amendment right to counsel. 475 U.S. at 630 n.4. Obviously, the words from the Michigan Supreme Court's decision set out above could not have been intended

by that court to support a contrary conclusion. Neither should this Court's quotation of them.

More importantly, irrespective of the meaning of the words that was intended by the Michigan Supreme Court, those words are not, on their face, necessarily inconsistent with the state's position that an "ordinary person" would view a defendant's request for counsel at a court appearance on a charged offense only as an invocation of his Sixth Amendment, and not as an invocation of his Fifth Amendment, right to counsel. Concededly, the "ordinary person" would probably not be able to attach the appropriate label to his or her view of the right to counsel that is being invoked. But, as indicated above, the "ordinary person" would be able to perceive the substance of what is being sought: the assistance of counsel to meet a particular charge, both at the court proceedings relating to that charge and perhaps

at police interrogation about it. That precisely describes what the Sixth Amendment guarantees. And the focus on the particular charge inhering in that perception nullifies any notion that it is the Fifth Amendment right to counsel that is being invoked, for that right is in no way tied to a particular offense, *see Arizona v. Roberson*, 486 U.S. at 685, and certainly is not limited to charged offenses. Thus, though unable to affix the proper label to the conclusion, the "ordinary person" would understand that it is the Sixth Amendment right to counsel, and not the Fifth Amendment right, that a defendant is invoking when he appears with counsel on a charged offense.

Giving a defendant's appearance with counsel at a court hearing on a charged offense its "ordinary meaning," as *Barrett* counsels should be done, there is no basis for finding an invocation of the Fifth

Amendment right to counsel implicit in such an appearance:

> [T]o find that [the defendant] invoked his Fifth Amendment right to counsel on the present charges merely by requesting the appointment of counsel at his arraignment on the unrelated charge is to disregard the ordinary meaning of that request.

State v. Stewart, 113 Wash. 2d 462, 780 P.2d 844, 849 (1989).

D. Examining the issue presented from the perspective of policy: A balancing of society's "legitimate and substantial interest in securing admissions of guilt" from wrongdoers against the minimal increase in protection against compelled self-incrimination that adoption of the defendant's position would afford results in the conclusion that an appearance with counsel at a court hearing on a charged offense should not be deemed an invocation of the Fifth Amendment right to counsel that would bar police-initiated interrogation about unrelated offenses.

This section of the state's brief will examine the policy implications of the ruling this Court is being asked to make. In undertaking that examination, there are "two

competing concerns" that must be considered. *Moran v. Burbine*, 475 U.S. 412, 426 (1986). On one side of the scales is "'the need for police questioning as a tool for effective enforcement of criminal laws.'" *Id.* On the other is the "risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion." *Id.* An examination of the two sides of the scales reveals that a proper striking of the balance in this case between the two competing concerns requires rejection of the defendant's position.

On one side of the scales: the interest in effective law enforcement. There is no doubt, under this Court's decisions, that this interest lies heavy in the scales. As this Court noted in *Miranda*: "Confessions remain a proper element in law enforcement." 384 U.S. at 478. "[F]ar from being prohibited by the Constitution, admissions of

guilt by wrongdoers, if not coerced, are inherently desirable." *United States v. Washington*, 431 U.S. 181, 187 (1977); *accord Oregon v. Elstad*, 470 U.S. 298, 305 (1985).

Indeed, they are more than "desirable," they are "essential":

> Admissions of guilt are more than merely "desirable," [citation omitted]; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.

Moran v. Burbine, 475 U.S. at 426.

In short, society has a "legitimate and substantial interest in securing admissions of guilt" from wrongdoers. *Moran v. Burbine*, 475 U.S. at 427.

There is little doubt that a holding that *Edwards* is applicable in the present context would seriously impede police investigative activity aimed at securing admissions of guilt. Common sense and experience teach that numerous criminal defendants formally charged with one crime are suspects in oth-

ers, sometimes, as in this case, arising from other jurisdictions. *See Arizona v. Roberson*, 486 U.S. at 689 (Kennedy, J., dissenting). Once the suspect has been charged with an offense, his appearance with counsel at a court hearing on that offense would be all but inevitable, given the public defender system in place in so many jurisdictions. Thus, a person charged with a criminal offense would almost invariably be immunized from any police-initiated interrogation regarding other offenses of which he is suspected. That would create a substantial impediment to the effective investigation of criminal activity.

On the other side of the scales: the interest in protecting the defendant's privilege against self-incrimination. This interest, though obviously substantial in the abstract, has little weight in this case. At issue here is the scope of the application of the *Edwards* rule prohibiting police-

initiated interrogation after an invocation of the Fifth Amendment right to counsel. *Edwards* is a prophylactic rule designed to safeguard the Fifth Amendment privilege against self-incrimination. But, as such, it does not operate directly to protect that privilege. Rather, it simply serves as a "corollary"--a "second layer of protection"--to yet another prophylactic rule: the requirement of *Miranda* that interrogation cease upon a request for counsel. *Minnick v. Mississippi*, 59 U.S.L.W. 4037, 4038 (U.S. Dec. 3, 1990); *Arizona v. Roberson*, 486 U.S. at 680; *Michigan v. Harvey*, 110 S. Ct. 1176, 1180 (1990). The *Miranda* rule, in turn, was created to directly safeguard the privilege against compelled self-incrimination actually provided by the Constitution. *Id.*

What this Court is dealing with here, then, is "prophylaxis built upon prophylaxis." *Minnick v. Mississippi*, 59 U.S.L.W. at 4042 (Scalia, J., dissenting). It is oper-

ating at the outer fringes of the elaborate scheme of protection of the Fifth Amendment that *Miranda* and its progeny have created.

With the prophylactic rule at issue (i.e., the *Edwards* rule) so far removed from the actual command of the Fifth Amendment, a claim that its application in the present context is necessary to protect the Fifth Amendment privilege can properly be viewed with skepticism. And an examination of the fears that prompted the rule reveals that they have little substance in the situation presented here.

The *Edwards* rule is designed to protect an accused in police custody "from being badgered" by the police. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983); *accord Smith v. Illinois*, 469 U.S. 91, 98 (1984). Apparently, this Court's concern in that regard is that "the suspect may believe his rights are fictitious if he must assert them a second time." *Arizona v. Roberson*, 486

U.S. at 690 (Kennedy, J., dissenting, but describing the majority's concern).

That concern has little substance in the present context. As already pointed out above in the section of this brief dealing with the question of "perception," a defendant appearing with counsel at a court hearing on a particular charge would ordinarily view the invocation of the right to counsel implicit in such appearance as an invocation of the right to counsel that the Sixth Amendment affords to assist him in dealing with the State on the particular charged offense. He would not view it as an invocation of his right to counsel at interrogation on other uncharged offenses that *Miranda* affords.

Thus, police initiation of interrogation about other uncharged offenses would not be viewed as incompatible with the invocation of the right to counsel inherent in the earlier appearance with counsel. The police-

initiated interrogation about other offenses would not give the defendant pause to wonder whether the right to counsel he had implicitly invoked was fictitious, for the defendant would not perceive any inconsistency between his invocation of his right to counsel on a charged offense, made by appearing with counsel at a proceeding relating to that offense, and the initiation of interrogation about other offenses.

In short, the prospect of police "badgering" against which the *Edwards* rule is designed to protect is all but nonexistent in the situation presented here, where there has been no invocation of the right to counsel in the context of custodial interrogation and the police-initiated interrogation concerns offenses other than the charged offense with respect to which counsel was invoked at a court proceeding.

Moreover, it must be remembered that a refusal to apply *Edwards* in situations such

as that presented here would not leave an accused defenseless against compelled self-incrimination. There would still remain the prophylactic safeguards directly afforded by *Miranda*: the admonition regarding the rights to silence and counsel and the need to secure a waiver of those rights before interrogation commenced. *See State v. Stewart*, 780 P.2d at 851 n.4.

Consideration of whether the need to protect a defendant's Fifth Amendment privilege warrants application of the *Edwards* rule in situations such as that presented here would not be complete without some discussion of the facts of this case. The present defendant can hardly make a credible claim that he was subjected to the sort of "badgering" about which *Edwards* is concerned in view of the testimony that: the police interview with him following his court appearance with counsel was prompted, at least in part, by his girlfriend's statement that he had indi-

cated, prior to that court appearance, that he wanted to talk to the officer who interviewed him (R. 43:8-9); and, at that interview, he was the one who broached the subject of the crimes at issue in this case before the police officer could even begin to talk to him about anything else (R. 40:14). Under *Edwards*, that testimony is irrelevant, however, because, once the right to counsel has been invoked, any statements taken from a defendant during an interview that the police subsequently initiate are inadmissible.

This fact--that testimony showing that the defendant affirmatively wanted to talk about the crimes at issue in this case would have no role to play in the disposition of this case if the *Edwards* rule were found applicable here--demonstrates how far the rule is removed from the evil against which it is designed to protect: compelled self-incrimination. It demonstrates the folly

of applying the *Edwards* rule in the present context. Application of that rule here would require suppression of statements that the record clearly reveals the defendant affirmatively wanted to make.

Balancing the scales. At some point the increase in the protection from compelled self-incrimination afforded by the *Edwards* rule becomes too slight, and the increase in the interference with effective law enforcement too severe, to warrant application of that rule. That point has been reached in this case. As a matter of sound policy, this Court should reject the notion that the *Edwards* rule has any applicability when a defendant appears with counsel at a court proceeding on a charged offense and then is subjected to custodial interrogation about other uncharged offenses.

E. Examining the issue presented from the perspective of perspicuity: A holding that the Fifth Amendment right to counsel is not invoked by appearance with counsel at a court hearing on a charged offense would provide a "bright-line" rule that would most closely accord with reality and that would afford the clearest guidance to those involved in the administration of the criminal justice system.

As the defendant points out in his brief (defendant's brief at 30), this Court has "repeatedly emphasized the virtues of a *bright-line rule* in cases following *Edwards* as well as *Miranda*." *Arizona v. Roberson*, 486 U.S. at 681 (emphasis supplied). It has also pointed out that "[t]he merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Minnick v. Mississippi*, 59 U.S.L.W. at 4038. Thus, resolution of the question whether *Edwards* should apply when a defendant who has appeared with counsel at court proceedings on a charged offense is subjected to police-initiated interrogation about

other, unrelated and uncharged offenses requires consideration of the effect of a decision one way or the other on the clarity of the application of *Edwards*.

Insofar as a "bright-line" rule is concerned, neither party to this appeal has an advantage over the other. The defendant seeks a rule that an accused who appears with counsel at a court proceeding on a charged offense thereby invokes his Fifth Amendment right to counsel and consequently triggers the *Edwards* rule forbidding any further police-initiated interrogation on any offense, including other, uncharged offenses. Unquestionably, that is a "bright-line" rule.

The state seeks a rule that an accused who appears with counsel at a court proceeding on a charged offense does *not* thereby invoke his Fifth Amendment right to counsel and consequently does *not*, at least insofar as unrelated, uncharged offenses are con-

cerned, trigger the *Edwards* rule forbidding any further police-initiated interrogation. That is every bit as "bright line" a rule as the one the defendant seeks. Based purely on the nature of the rule each party asks this Court to adopt, this Court's penchant for "bright-line" rules should not incline it to favor either party's position over the other's.

That, however, does not mean that a desire for clarity in the administration of the *Edwards* rule has no role to play in the disposition of this case. On their face, neither of the two rules sought by the parties has a greater claim to providing "bright-line" guidance when those involved in the administration of the criminal justice system face the specific situation to which the rules are addressed. But, once one moves beyond the face of the rules and considers their impact in situations to which they might not be directly applicable,

but in which they might be examined for guidance, the situation changes. Adoption of the state's rule would promote clarity in application of the *Edwards* rule, while adoption of the defendant's would undermine it.

To see that, one need only consider what the state has already pointed out in the section of this brief where the issue presented has been viewed from the perspective of "principle." There, the state demonstrated that the rule it proposes is based on the principled position that an invocation of the Fifth Amendment right to counsel only occurs when the right to counsel is invoked by an in-custody suspect in response to *Miranda* warnings, or in direct anticipation of, or during, interrogation. The rule the defendant proposes, on the other hand, is based on the unprincipled "broad interpretation" approach to invocations of the right to counsel.

The state's position, grounded as it is in the *Miranda* decision, provides a clear basis for deciding when an invocation of the right to counsel constitutes an invocation of the Fifth Amendment right to counsel. It establishes a benchmark that can be invoked in contexts other than that presented here to decide whether there has been an invocation of the Fifth Amendment right to counsel.

The defendant's position, on the other hand, leaves a court at sea when confronted with the question of whether there has been an invocation of the Fifth Amendment right to counsel. Unless every request for counsel--whenever, wherever, and however made--constitutes an invocation of the Fifth Amendment right to counsel--a position the state does not believe could be rationally defended--the "broad interpretation" approach underlying the rule the defendant proposes provides no real guidance to one

trying to determine whether there has been an invocation of the Fifth Amendment right to counsel. Rather than promote clarity, adoption of the defendant's rule would promote the confusion that a "bright-line" rule is supposed to dispel. For that reason, it should be rejected.

There is another reason for rejecting the defendant's proposed "bright-line" rule and adopting the state's. As a matter of principle, "bright-line" rules ought generally to accord with reality. Certainly in the Fourth Amendment context that appears to have been a guiding precept. For example, in creating a "bright-line" rule governing the scope of warrantless searches of an automobile pursuant to an arrest, this Court permitted a search of the passenger compartment of the automobile because

> articles inside the relatively narrow compass of the passenger compartment of an automobile *are in fact generally, even if not inevitably,* within 'the area into which an arrestee might

> reach in order to grab a weapon or evidentiary ite[m].'"

New York v. Belton, 453 U.S. 454, 460 (1981) (emphasis supplied).

Reality counsels in favor of adopting the state's proposed "bright-line" rule. As pointed out in the section of this brief dealing with the question of "perception," the "ordinary person" would view an appearance with counsel at a court hearing on a criminal charge as an invocation of the right to counsel that is afforded by the Sixth Amendment, and not of the right to counsel that has been created to protect the Fifth. Even if it is not invariably the case that a defendant appearing with counsel at a court hearing on a criminal charge would share the "ordinary person's" view that it is his Sixth- Amendment right to counsel and not his Fifth that he is invoking by such appearance, that would generally be true. And others involved in the criminal justice system--defense counsel, prosecuting attorneys, police officers, etc.--would, as a general proposition, certainly share the "ordinary person's" view.

Thus, as a general proposition, the state's proposed rule accords with reality. The defendant's does not. For that reason, this Court should accept the state's and reject the defendant's.

F. Examining the issue presented from the perspective of precedent: The majority of state courts confronting the issue presented in this case conclude that an appearance with counsel at a court hearing on a charged offense is not an invocation of the Fifth Amendment right to counsel; the federal circuit court of appeals' decisions are more evenly split on the issue, but those supporting the defendant's position provide cause for questioning the desirability of adopting that position; and, contrary to the defendant's contention, precedent from this Court has not resolved the issue.

The Wisconsin Supreme Court does not stand alone in holding that an invocation of

the right to counsel at a court hearing on a charged offense is not an invocation of the Fifth Amendment right to counsel. While the courts are divided on the issue, the majority have lined up with the Wisconsin Supreme Court's decision in this case, at least in the state courts.

The appellate courts in the following states stand with the Wisconsin Supreme Court:

- **Arizona:** *State v. Hitch*, 160 Ariz. 297, 772 P.2d 1150, 1152-54 (Ct. App. 1989).
- **Illinois:** *People v. Bryant*, 559 N.E.2d 930, 934-38 (Ill. App. Ct. 1990); *People v. Jackson*, 145 Ill. Dec. 1, 198 Ill. App. 3d 831, 556 N.E.2d 619, 624-28 (1990).
- **Michigan:** *People v. Crusoe*, 433 Mich. 666, 449 N.W.2d 641, 647-54 (1989); *People v. Bladel*, 421 Mich. 39, 365 N.W.2d 56, 61-63 (1984), *aff'd on other grounds sub. nom. Michigan v. Jackson*, 475 U.S. 625 (1986).
- **Oregon:** *State v. Sparklin*, 296 Or. 85, 672 P.2d 1182, 1183-90 (1983).
- **Pennsylvania:** *Commonwealth v. Davis*, 565 A.2d 459, 459-62 (Pa. Super. Ct. 1989).
- **Washington:** *State v. Stewart*, 113 Wash. 2d 462, 780 P.2d 844, 846-53 (1989).

The state's research has uncovered only two state jurisdictions that adhere to a contrary position:

- **Arkansas:** *Sutherland v. State*, 299 Ark. 86, 771 S.W.2d 264, 265-66 (1989).
- **Vermont:** *State v. Preston*, 150 Vt. 511, 555 A.2d 360, 362-63 (1988).

More important than numbers, however, is the quality of the decisions on the two sides of the issue. The decisions supporting the Wisconsin Supreme Court's holding in this case are marked by extended and thoughtful analysis of the issue. The two opposing decisions, by contrast, either have no analysis of the issue at all (*Sutherland*), or have simply followed, without any real independent exploration of the issue, the Seventh Circuit Court of Appeals' decision in *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir.), *cert. denied*, 483 U.S. 1010 (1987) (*Preston*).

That brings us to the federal precedent on the issue. Here, the split in the authority is more evenly divided.

The Seventh Circuit Court of Appeals, in *Espinoza*, reached a decision directly contrary to the Wisconsin Supreme Court's decision in this case. But it did so by invoking the "broad interpretation" approach to requests for counsel that, as the state has shown earlier in this brief, provides no principled basis for resolving the issue presented. 813 F.2d at 122-23.

Opposing *Espinoza* and supporting the Wisconsin Supreme Court's decision in this case is the decision of the Second Circuit Court of Appeals in *United States v. Roberts*, 869 F.2d 70, 74 (2d Cir. 1989):

> Roberts, however, would have us hold that once an accused has asserted his Sixth Amendment right to counsel, *Edwards* acts as a bar that will invalidate any waiver of the Fifth Amendment right to counsel in an investigation of a wholly new incident. It would thus be impossible for a suspect to waive his right to counsel and for

> questioning on a new offense to proceed if the accused had asserted his right to counsel at any earlier point in his dealings with the authorities.
>
> We see no reason for such an extension of *Edwards*.

Not quite so clearly lined up on either side of the issue, however, are the Fourth, Sixth, and Eleventh Circuits. In its decision in *Butler v. Aiken*, 864 F.2d 24, 25 (4th Cir. 1988), which was ultimately to be sustained by this Court on other grounds (i.e., the nonretroactivity of *Roberson*), *see Butler v. McKellar*, 110 S. Ct. 1212 (1990), the Fourth Circuit "*assume[d] for purposes of decision* that the appearance of counsel with Butler at a bond hearing on the assault charge for which he was first arrested conclusively demonstrated invocation of Butler's fifth amendment rights" (emphasis supplied).

The Sixth Circuit's decisions are a mixed bag. In *Boles v. Foltz*, 816 F.2d 1132, 1135 (6th Cir.), *cert. denied*, 484 U.S. 857

(1987), the court held that a desire for counsel at the preliminary hearing to be held on the charged offense--a desire expressed at an arraignment on the charge--was not an invocation of the Fifth Amendment right to counsel that barred police-initiated interrogation about other offenses. In *United States v. Wolf*, 879 F.2d 1320, 1323 (6th Cir. 1989), the court held that a general request, made at an arraignment, for appointed counsel that was not tied to any particular upcoming court appearance, as had been the request in *Boles*, constituted an invocation of the Fifth Amendment right to counsel that barred police-initiated interrogation. Finally, in *United States v. Hall*, 905 F.2d 959, 963 (6th Cir. 1990), the court found that a request for counsel at an arraignment on an escape charge did constitute an invocation of the Fifth Amendment right to counsel, but that it did *not* bar police-initiated interrogation two months

later (during the two months the defendant had apparently been kept in continuous custody) on an unrelated charge.

The Sixth Circuit's decisions demonstrate what happens when a court adopts the present defendant's position. To avoid the detrimental impact of the *Edwards* rule on effective law enforcement, a court is forced to resort to circumventions (e.g., a request for counsel tied to a particular court appearance is not really a request for counsel's aid at other critical stages of the prosecution [*Boles*]; after some period of time the restraints of *Edwards* disappear even though the defendant has been held in continuous custody [*Hall*]) that really muddy the scope of the application of the *Edwards* rule. The Sixth Circuit's perceived need to find some rationale, however dubious, to avoid the consequences of the *Edwards* rule in situations such as that presented here

demonstrates the undesirability of holding that rule applicable in the first place.

The Eleventh Circuit at one time was firmly in the state's camp. *See Collins v. Francis*, 728 F.2d 1322, 1332-33 (11th Cir.), *cert. denied*, 469 U.S. 963 (1984), *reh'g denied*, 469 U.S. 1143 (1985):

> Collins' request for counsel at his arraignment did not place his request in the *Miranda/Edwards* fifth amendment right-to-counsel posture. . . .
>
> . . . .
>
> We think it clear that petitioner at no time indicated that he wished to take advantage of his fifth amendment right to silence or to counsel by asking that interrogation cease. Rather, petitioner indicated at arraignment that he desired counsel in the sixth amendment sense, to handle his case.

The ultimate holding in *Collins*, however, can no longer stand in light of this Court's decision in *Michigan v. Jackson*, for that holding permitted police-initiated interrogation *on the charged offense* after the invocation of the Sixth Amendment right to

counsel--interrogation that *Jackson* forbids. *See Cervi v. Kemp*, 855 F.2d 702, 706-07 n.11 (11th Cir. 1988). Whether the Eleventh Circuit, if confronted with the issue today, would still cling to its holding, quoted above, regarding the Fifth Amendment right to counsel is not clear.

The foregoing review of the decisions of other courts dealing directly with the issue presented, though certainly far from dispositive in this Court, supports the conclusion that the Wisconsin Supreme Court correctly decided this issue. The majority of state courts line up behind the Wisconsin Supreme Court and do so in decisions that contain extensive analyses of the issue leading to well-reasoned conclusions.

While the federal decisions are more evenly split, a number of them support the Wisconsin Supreme Court's decision. And an examination of the ones that do not, particularly the series of cases from the Sixth

Circuit, should give this Court real pause before it adopts the defendant's position. The fact that the Sixth Circuit has had to resort to dubious grounds to avoid the full impact of its adoption of the defendant's position sends a clear message as to the desirability of adopting that position in the first place.

The defendant apparently believes that the foregoing appeal to precedent from other jurisdictions is all beside the point. In his brief, he suggests that this Court has already "implicitly" decided the issue presented in its decisions and orders in *Wyrick v. Fields*, 459 U.S. 42 (1982); *Wolf v. United States*, 488 U.S. 807 (1988); and *Butler v. McKellar*, 110 S. Ct. 1212 (1990) (defendant's brief at 10, 26-29).

Contrary to the defendant's contention, *Wyrick* does not implicitly hold that the defendant there "invoked his [Fifth Amendment] right to counsel by retaining counsel"

(defendant's brief at 27). The question this Court was facing in *Wyrick*--whether special protection of the Fifth Amendment right to counsel is necessary in the context of a post-polygraph-test interview--was in no way dependent on there having been an invocation of the right to counsel. The analysis of that question that this Court undertook in *Wyrick* would have been necessary whether the defendant had invoked his right to counsel or not. One cannot legitimately find in that analysis an implicit finding that the defendant there had invoked his Fifth Amendment right to counsel by retaining counsel or otherwise.

Likewise, there was no implicit adoption of the present defendant's position in *Wolf*. In that case, which concededly involved a situation similar to that presented here, all this Court did was to remand the case to the Sixth Circuit Court of Appeals "for further consideration in light of *Arizona v.*

Roberson." 488 U.S. at 807. Such a disposition is not "a final determination on the merits." *Henry v. Rock Hill*, 376 U.S. 776, 777 (1964) (footnote omitted). All "the lower court is being told [is] to reconsider the entire case in light of the intervening precedent--which may or *may not* compel a different result." R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* at 280 (6th ed. 1986) (emphasis supplied; footnote omitted). It certainly cannot be deemed an "implied" holding "that the request for appointed counsel at an arraignment triggers the *Roberson* rule," as the defendant contends (defendant's brief at 10).

Nor does *Butler v. McKellar* impliedly hold "that appearance with counsel at a bond hearing triggers the *Roberson* rule," as the defendant contends (*id.*). In *Butler*, this Court was directly presented with the issue whether the defendant's appearance with

counsel at a bond hearing constituted an invocation of the defendant's Fifth Amendment right to counsel that would trigger the *Edwards* rule as explicated in *Roberson*. *See Brief of Respondents* in *Butler v. McKellar*, No. 88-6677, at 33-45. This Court found it unnecessary to reach that issue, however. It was able to dispose of the case on the ground that *Roberson* was not to be applied retroactively on collateral review of the defendant's conviction. *Butler v. McKellar*, 110 S. Ct. at 1216-18.

Thus, review of the precedent the defendant cites reveals that, contrary to his contention, no decision of this Court has implicitly decided the issue presented. It must be resolved by examining the factors the state has surveyed in this brief: principle, perception, policy, perspicuity, and the precedent from other jurisdictions that has directly decided the issue. Such examination can result in only one conclusion:

a defendant who appears with counsel at a court hearing in a criminal prosecution does not thereby invoke his Fifth Amendment right to counsel.

CONCLUSION

For the reasons stated, the judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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